

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

|                          |   |                     |
|--------------------------|---|---------------------|
| UNITED STATES OF AMERICA | ) |                     |
|                          | ) |                     |
| v.                       | ) | Criminal No. 08-181 |
|                          | ) |                     |
| GARY LEE MYERS           | ) |                     |
|                          | ) |                     |

MEMORANDUM

Gary L. Lancaster,  
District Judge.

March 7, 2009

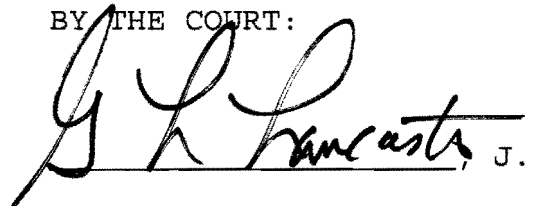
Defendant appeared before the court for sentencing on a charge of possession of child pornography on March 6, 2009. At the sentencing hearing, the United States Attorney urged this court to apply a four level enhancement to defendant's offense score because the offense "involved material that portrays sadistic or masochistic conduct or other depictions of violence ...." U.S.S.G. § 2G2.2(b)(4). Specifically, the parties' stipulation submitted to the court during the sentencing hearing described the conduct portrayed in three of the videos at issue as including genital penetration of prepubescent minors by adult males.

The Court of Appeals for the Third Circuit, however, has not yet held that genital penetration of a prepubescent minor by an adult male is, by definition, "sadistic or masochistic conduct, or another depiction of violence," within the meaning of § 2G2.2(b)(4). Additionally, the United States Sentencing Guidelines provide no guidance on what constitutes "sadistic or masochistic conduct or other depictions of violence." *Id.* While several other courts of appeals have found that genital penetration

of a prepubescent minor by an adult male is encompassed within the meaning of § 2G2.2(b)(4), those decisions are not binding on this court.

We note that the four level enhancement to defendant's offense level would result in a recommended guideline range of 78 to 97 months incarceration. Defendant's recommended guideline range without the four level enhancement is 51 to 63 months incarceration, which is a significant term of incarceration, especially for a first time offender. The court concludes that a sentence of 51 months incarceration is a sufficient and reasonable sentence under the circumstances of this case.

BY THE COURT:

A handwritten signature in black ink, appearing to read "G. R. Lancaster, J.", written over a horizontal line.

cc: All Counsel of Record